Supreme Court, U.S.
FILED
98 438 SEP 14 1998
OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

MARK K. HEDRICK,
Petitioner,

v.

JOHN J. CALLAHAN, Commissioner of
the Social Security Administration,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Christian J. Gros
900 N.E. Loop 410, Suite D-307
San Antonio, Texas 78209
(210) 829-7085
(210) 829-1987 FAX

Counsel for Petitioner

---

37 pp

QUESTIONS PRESENTED

1. May a court shift the burden of providing an administrative record to a social security claimant when portions of the record are missing?

2. Does a court satisfy its duty to review the totality of the record under 42 U.S.C. §405(g) on review of a social security determination when portions of the administrative record are missing?

LIST OF PARTIES

Petitioner Mark Hedrick was denied disability benefits under Title II of the Social Security Act (the Act). He exhausted all avenues of administrative review before the Commissioner of Social Security and timely filed a complaint in Federal District Court. The Magistrate Law Judge, Jane Cooper-Hill issued a Memorandum and Recommendation to affirm the Commissioner's decision which was adopted, over objection, by the District Judge, the Honorable Janis Graham Jack. Mark Hedrick was the appellant before the Fifth Circuit Court of Appeals. The Commissioner of Social Security, John J. Callahan, was the appellee in the Fifth Circuit Court of Appeals.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION OF THE COURT 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

A. The Facts 2

B. The Magistrate Judge's Ruling 3

C. The District Court's Ruling 4

D. The Court of Appeals' Ruling 4

REASONS FOR GRANTING THE WRIT 5

I. THE CIRCUITS ARE SPLIT AS TO WHETHER A COURT MAY ADJUDICATE A SOCIAL SECURITY APPEAL ON AN INCOMPLETE ADMINISTRATIVE RECORD 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Brown v. Sullivan, 912 F.2d 1194 (10th Cir. 1990) 7

McGloner v. Heckler, 791 F.2d 1119 (4th Cir. 1986) 7

Randall v. Sullivan, 956 F.2d 105 (5th Cir. 1992) 6

Richardson v. Perales, 402 U.S. 389, 390, 91 S.Ct. 1420, 1421, 28 L.Ed. 2d 842 (1971) 6

Scime v. Bowen, 822 F.2d 7 (2nd Cir. 1987)..... 7

Scott v. Bowen, 808 F.2d 1428 (11th Cir. 1987) 7

Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) 6, 7

Varney v. Secretary of HHS, 846 F.2d 581 (9th Cir. 1988) . 6

Ward v. Heckler, 786 F.2d 844 (8th Cir. 1986)..... 7

STATUTES

28 U.S.C.§1254(1) 1

42 U.S.C.§405(g) 1, 4, 5, 6, 7

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case June 16, 1998.

OPINIONS BELOW

The opinion of the Magistrate Judge is not reported but is reproduced in the Appendix at 3. The opinion of the United States District Court for the Southern District of Texas adopting the recommendation of the Magistrate Judge and affirming the prior administrative law decision is not reported but is reproduced in the Appendix at 2. The opinion of the Court of Appeals is not published but is reproduced in the Appendix at 1. No request for rehearing or rehearing en banc was filed.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals was entered June 16, 1998. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statutes involved are 42 U.S.C. §405(g).

STATEMENT OF THE CASE

A. The Facts

Mr. Hedrick was born on July 31, 1955. (Tr. 36) He was 40 years of age at the time of the administrative hearing. (Tr. 36) He has a high school education. (Tr. 36) He is married and has one child who resides with him. (Tr. 37) On or about 1989, he injured himself in a work related accident. (Tr. 38-9).

Mr. Hedrick suffers from a combination of physical and nonexertional problems which alone or in combination renders him unable to perform substantial gainful activity. His medical history is extensive starting with emergency room treatment in 1989 following his accident. (Tr. 123-6) He was followed continuously by various doctors and chiropractors. (Exh. AC 1-5, Exh. 23-30, Exh. 40-43) His history of medical treatment spans a period of six years.

The Plaintiff filed an application for both a period of disability and supplemental security income with protective filing date of May 4, 1993. (Exh. 2 and 3)[1] The Plaintiff followed all procedural requirements in the administrative appeal process and obtained a hearing before an administrative law judge [ALJ] on September 11, 1995. (Tr. 33, commencing) The Plaintiff received an unfavorable determination from the ALJ on or about October 27, 1995. (Tr.13-21) The Plaintiff filed a timely request for review of the decision. (Tr. 12) The Appeals Council denied the requested review on or about September 24, 1996. (Tr. 10-11) The Plaintiff submitted additional evidence to the Appeals Council. (Tr. 7) The

---

[1] [Exh.] refers to the exhibits in evidence in the official agency transcript. [Tr.] refers to portions of the official agency transcript of proceedings found in the record on appeal as volume 2. [R.] refers to portions of the record on appeal.

Appeals Council refused to reopen the ALJ decision of October 27, 1995. (Tr. 5-6) The Plaintiff filed a complaint in Federal District Court within sixty days of receipt of the last administrative action on his case. (R. 1)[2]

B. The Magistrate Judge's Recommendation

The Plaintiff filed a motion for summary judgment and supporting brief outlining various errors in the administrative proceedings. (R.11-12) The Commissioner filed a response in support of the agency action. (R. 15) The Honorable Jane Cooper-Hill, Magistrate Judge entered her Memorandum and Recommendation On Plaintiff's Motion for Summary Judgment on May 28, 1998. Appendix 3. The Magistrate Judge found that no errors of law were committed by the administrative law judge in evaluating Mr. Hedrick's case and that the determination of the Commissioner was supported by substantial evidence. The Magistrate Judge further rejected Mr. Hedrick's Due Process arguments based upon the omission of certain exhibits from the administrative record. Specifically, two state agency disability evaluations were omitted from the record.[3] The Magistrate Judge found that Mr. Hedrick failed to show how he was prejudiced by the absence of this documentation. Appendix 3. However, an examiner with the same State agency commented that Mr. Hedrick could not physically endure training or work on a daily basis and could

---

[2] *Mark K. Hedrick v. John J. Callahan*, C-96-583 (unreported)

[3] The missing exhibits are Exhibit 5, Disability Determination by the State Agency on Plaintiff's Title XVI claim and Exhibit 10 is the February 4, 1994, Reconsideration Disability determination by the State Agency on Plaintiff's Title XVI claim. No State Agency determinations on the Plaintiff's Title II claim appear in the record.

not travel for such training. (Exh. AC-1) Mr. Hedrick filed timely objections to the memorandum and recommendation.

C. The District Court's Ruling

The District Court, per the Honorable Janis Graham Jack, reviewed the record, the memorandum and recommendation and the objections of Mr. Hedrick and issued a one page order adopting the memorandum and recommendation. Appendix 2. The District Court did not elaborate on the findings or conclusions of the Magistrate Judge; rather the court adopted them as its own. *Id.*

D. The Court of Appeals' Ruling

After a two page decision the Court of Appeals affirmed for the reasons "stated by the magistrate judge and adopted by the district court. *See Hedrick v. Callahan*, C-96-CV-583 (S.D. Tex. July 24, 1997)."

REASONS FOR GRANTING THE WRIT

This case presents a case of denial of due process in an administrative proceeding as to which the Circuits are divided: whether a social security claimant must demonstrate prejudice to allege a denial of due process from the omission of documentary evidence in the official agency transcript on appeal to the district court. The issue is whether the district court under its appellate role may determine the materiality of missing agency documents and proceed to an adjudication of the case under substantial evidence standards. 42 U.S.C. §405(g). To uphold the court's ruling in this instance would substantially alter statutory authority that provides that the Commissioner of Social Security has the duty to file the complete administrative record. Secondarily, to uphold this

decision would significantly change the standard of review of such cases permitting disposition on less than the entire record absent a showing of prejudice to the claimant. This is not consistent with this Court's prior pronouncements. It is also inconsistent with the substantial evidence standard.

Thus, the decision below raises important issues of fundamental due process when it holds that the court may in the first instance determine the materiality of missing documents in an administrative agency record, and proceed to a determination based on a substantial evidence standard of review. Also, the prior decisions place the burden on the social security claimant to show prejudice in cases in which the administrative record is incomplete. The Circuits are split on these issues. The Fifth Circuit imposes a harsh standard on the claimant and ignores the duty of the Commissioner to produce the administrative record.

I. THE CIRCUITS ARE SPLIT AS TO WHETHER A COURT MAY ADJUDICATE A SOCIAL SECURITY APPEAL ON AN INCOMPLETE ADMINISTRATIVE RECORD

The Circuits are split as to whether a federal court, in reviewing a denial of social security disability benefits under 42 U.S.C.§405(g), may proceed to make a substantial evidence determination when the entire record is not before the court.

The pertinent federal statute authorizing federal court review of social security disability determinations, 42 U.S.C. §405(g) states in pertinent part that:

> As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the

> evidence upon which the findings and decision complained of are based....

42 U.S.C.§405(g). Thus, the duty to bring the entire record forward rests exclusively upon the Commissioner, not the claimant.

The statute also provides as follows:

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing....

42 U.S.C.§405(g). This Court has held that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1421, 28 L.Ed.2d 842 (1971). The reviewing court must consider the totality of the record to determine if the decision is supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

The Fifth Circuit has held that the reviewing court must consider the entire record, including evidence that may be contrary to the Commissioner's decision. *Randall v. Sullivan*, 956 F.2d 105 (5th Cir. 1992). However, there is disagreement among the Circuits on whether a court can proceed to judgment when the record is incomplete. The Ninth Circuit has held that if there are only a few inaudible portions of the tape recorded hearing, and those portions do not significantly affect the transcript, the court may review the case on the merits. *See, e.g. Varney v. Secretary of HHS*, 846 F.2d 581 (9th Cir. 1988). The Fourth Circuit has shifted the burden to the claimant

seeking remand due to an inaudible transcript to show the materiality of the missing material. *McGlone v. Heckler*, 791 F.2d 1119 (4th Cir. 1986). The Eighth Circuit employs a vague standard that permits the court to review the claim if the record "is adequate to allow judicial review." *Ward v. Heckler*, 786 F.2d 844 (8th Cir. 1986). Other courts hold that when the transcript is missing or inaudible the case must be remanded for rehearing. *Brown v. Sullivan*, 912 F.2d 1194 (10th Cir. 1990); *Scime v. Bowen*, 822 F.2d 7 (2nd Cir. 1987); *Scott v. Bowen*, 808 F.2d 1428 (11th Cir. 1987). The Fifth Circuit in this case has permitted the court to adjudicate the claim on the merits when documentary evidence was missing from the transcript. Appendix 3. By so holding, the Fifth Circuit has shifted the burden of producing the administrative record from the Commissioner to the claimant--a result that is contrary to statute. 42 U.S.C.§405(g). Also, by permitting an on the merits decision to be made when material evidence is missing, the Fifth Circuit has permitted determination of the case on less than the totality of the evidence contrary to the prior holding of this Court. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (*supra*).

For these reasons, the decision in this case sharply conflicts with *Universal* and its progeny and substantially alters the method of judicial review under 42 U.S.C.§405(g). Social Security disability claimants in the Fifth Circuit are subjected to a more rigid standard than in other Circuits with respect to showing prejudice from the absence of portions of the agency record. Social Security claimants in the Fifth Circuit are required to assume the Commissioner's duty to complete the record set forth by statute. 42 U.S.C.§405(g).

CONCLUSION

For the reasons stated certiorari should be granted.

Respectfully submitted,

Christian J. Gros
900 N.E. Loop 410, Suite D-307
San Antonio, Texas 78209
(210) 829-7085
(210) 829-1987 FAX

Counsel for Petitioner

APPENDIX

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-41043
Summary Calendar

MARK K. HEDRICK,

Plaintiff-Appellant,

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas
USDC No. C-96-CV-583

Filed June 16, 1998

Before JONES, SMITH, and STEWART, Circuit Judges.
PER CURIAM:*

Mark K. Hedrick appeals the district court's judgment affirming the decision of the Social Security Commissioner denying disability benefits pursuant to 42 U.S.C. § 405(g). He challenges that Commissioner's determination that Hedrick had

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

the residual functional capacity to perform a full range of sedentary work of an unskilled or semi-skilled nature, subject to no climbing, stooping, crawling, or kneeling. He specifically argues that he was denied due process because the record was not complete, the Appeals Council erred in failing to reopen the proceedings, the administrative law judge (ALJ) impermissibly considered Hedrick's apparent lack of discomfort during the hearing in reaching its determination, the treating physicians' opinions were not given their proper weight, his earnings represented failed work attempts or constituted substantial gainful activity, and the ALJ erred in offering an incomplete hypothetical question to the vocational expert.

We have reviewed the record and the briefs of the parties and find no reversible error. Accordingly, we AFFIRM for the reasons stated by the magistrate judge and adopted by the district court. *See Hedrick v. Callahan,* C-96-CV-583 (S.D. Tex. July 24, 1997).

AFFIRMED.

APPENDIX 2
IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS CORPUS CHRISTI DIVISION

MARK K. HEDRICK

V.

JOHN J. CALLAHAN,
ACTING COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION

C.A. NO. C-96-583
Entered July 24, 1997

On May 28, 1997, United States Magistrate Judge Jane Cooper-Hill filed a Memorandum and Recommendation recommending that Plaintiff's Motion for Summary Judgment be denied and the decision of the Commissioner affirmed. on June 10, 1997, Plaintiff filed his objections to the Memorandum and Recommendation of the Magistrate Judge.

Having reviewed the findings of fact and conclusions of law therein, as well as the pleadings on file and Plaintiff's objections, and having made a de novo disposition of those portions of the Magistrate Judge's recommended disposition to which objections were raised, *see Koetting v. Thompson*, 995 F.2d 37 (5th Cir. 1993) ; 28 U.S.C. § 636(b) (1) (C); Fed.R.Civ.P.72(b), the Court hereby adopts as its own the findings and conclusions of the Magistrate Judge.

Accordingly, it is

ORDERED that Plaintiff's Motion for Summary Judgment is DENIED and the Commissioner's decision is AFFIRMED.

SIGNED this 20th day of July, 1997.

JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. C-96-583

MARK K. HEDRICK

VS.

JOHN J. CALLAHAN,
ACTING COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION

Filed: MAY 28, 1997
Michael N. Milby
Clerk of Court

MEMORANDUM AND RECOMMENDATION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff seeks review of the Commissioner's decision denying plaintiff disability and supplemental social security benefits. The Administrative Law Judge ("ALJ") found that plaintiff's low back pain is severe and prevents plaintiff from performing his past relevant work, but that plaintiff has the residual functional capacity to perform other work. Based on these findings, the ALJ concluded that plaintiff was not disabled. Plaintiff now moves for summary judgment. For the reasons stated herein, the Court recommends that plaintiff's motion be denied, and the decision of the Commissioner affirmed.

Background

On September 13, 1993, plaintiff filed an application for disability insurance benefits and supplemental security income, with a protective filing date of May 4, 1993. (Tr at 57-66.) In his application, plaintiff alleged an inability to work since May 10, 1989, following a car accident in which plaintiff's back was injured. (Tr at.,123-24.)

Plaintiff was born on July 31, 1955. (Tr at 57.) He has a high school education. (Tr at 36.) Prior to his injury, plaintiff worked as an oil field sales and service representative from February 1978, through December 1994. (Tr at 95.) In January of 1985, plaintiff started his own oil field Service business, of which he was the sole owner, and he maintained that business through January of 1993. (Tr at 95.) In his business, plaintiff supervised 10-12 full-time employees (Tr at 91), and made all management decisions, (Tr at 91.) In a Work Activity Report dated September 18, 1993, plaintiff claimed that he did not earn any income from the business after his accident on May lo, 1989.[1] (Tr at 91.)

Plaintiff's medical records reveal that plaintiff went to the emergency room on May 10, 1989, stating that he had, been in a car accident approximately 30 minutes earlier.[2] (Tr at 123.)

---

[1] Plaintiff's earning record shows that, in fact, he earned the following: 1989 - $16,001; 1990 - $21,863; 1991 - $20,305; and 1992 - $13,011. (Tr at 88, 90.)

[2] The details of the car accident are contained in a September 9, 1992, report by Dr. Edward Sheffield. (Tr at 175.) According to Dr. Sheffield's, report, on May 10, 1989, at approximately 4:30 in the morning, plaintiff was driving his vehicle somewhere near El Campo, Texas. Plaintiff was following an eighteen wheeler tractor-trailer truck which braked without warning. Plaintiff's car ran into the back of the truck and was dragged by the truck some distance. Plaintiff was wearing his seat belt but hit the steering wheel with his head.

He was treated for a laceration on the forehead and released. (Tr at 123.) Plaintiff's treating physician, John Schulze, M.D., saw plaintiff on January 29, 1990. (Tr at 190.) Dr. Schulze's entry of January 29, 1990, states that he had not seen plaintiff since the May accident.[3] Dr. Schulze ordered a spinal X-ray.

On January 29, 1990, plaintiff went to Dr. H. R. Arnold, radiologist, for his spinal X-ray. The report of Dr. Arnold indicates slight degeneration of the LI-2 disc and kyphoscoliosis of the lower dorsal spine, with an otherwise negative study of the dorsal and lumbosacral spine. (Tr at 196.)

On June 19, 1991, plaintiff was evaluated by a neurologist, Dr. Wilbur Avant, Jr.. Dr. Avant reported that plaintiff had reduced sensation in the L5 dermatome on the left, but motor examination failed to show any significant focal abnormality or loss of power. (Tr at 133.) He diagnosed myofascial strain and/or neuromuscular dysfunction and recommended chiropractic treatment and additional testing. (Tr at 134.)

On August 19, 1991, plaintiff had an MRI. The MRI scan showed no significant evidence of disc disease in plaintiff's cervical or lumbar spine. (Tr at 130.) Plaintiff had a normal bone scan. (Tr at 130.) Dr. Avant prescribed a TENS unit for plaintiff's back, and continued to treat him through June 30, 1992. (Tr at 128-129.)

Plaintiff was taken to the emergency room by ambulance. At the hospital, X-rays were taken of his neck and back. No other recommendations were made except that he sees his family doctor when he returned to Corpus Christi. There was a possibility that plaintiff was inebriated because he was tested for alcohol per breathalyser.

[3] Dr. Schulze's records do not indicate that he saw plaintiff at any time in 1989. (Tr at 194-90.)

On June 15, 1992, plaintiff saw a neurosurgeon, Dr. Wayne Hurt. Plaintiff told Dr. Hurt that the chiropractic treatment had helped with the pain, but that he had not been able to work regularly since his injury. (Tr at 186.) Dr. Hurt concluded that plaintiff's neurological examination was normal, and opined that plaintiff had post-traumatic cervical and lumbar spine pain. (Tr at 187.)

On September 9, 1992, plaintiff saw Dr. Edward Sheffield, an orthopedic surgeon. Dr. Sheffield reported that plaintiff had a full range of motion of his cervical spine (Tr at 178), and was able to bend forward and touch his toes, (Tr at 179) . Plaintiff could not perform a single sit-up. (Tr at 179.) Dr. Sheffield reported that plaintiff became angry when he told him to lose weight and to do exercises for his back. (Tr at 180.)

On March 15, 1993, plaintiff saw Dr. Charles Kennedy, Jr., an orthopedic surgeon. Dr. Kennedy reported that plaintiff had a mild to moderate limitation of forward bending, and a normal neurological examination. (Tr at 141.) Dr.. Kennedy recommended a work conditioning program, anti - inflammatory medication, and a lumbocasral support with a biomagnet insert. (Tr at 142.)

Dr. Kennedy referred plaintiff to Workhealth Services, which performed a two-day evaluation of plaintiff's work capacity. (Tr at 171-17S.) The test was conducted on March 26 and 27, 1993. Plaintiff reported a pain level of 3, but stated that it increased to 10 or even worse at times. (Tr at 173.) Plaintiff demonstrated the ability to perform heavy work. (Tr at 172.)

Plaintiff continued to see Dr. Kennedy. On May 20, 1993, Dr. Kennedy stated that plaintiff had reached maximum medical improvement, and found that plaintiff had the capacity for medium/heavy work. (Tr at 137.) Dr. Kennedy recommended that plaintiff continue with chiropractic treatment. Plaintiff saw Philip Snowden, D.C., three times in

January 1995. (Tr at 219.) Snowden recommended weekly treatments . (Tr at 219.) Plaintiff again received treatment from Snowden from August 18, 1995, through August 25, 1995. (Tr at 234-236.)

Dr. Kennedy referred plaintiff to a neuromuscular therapist, John Barrera. Plaintiff received treatments from May 11, 1995, through July 12, 1995. (Tr at 221-231.). Barrera opined that plaintiff could lift 30 pounds occasionally and ten pounds frequently, stand and/or walk four hours per day, 30 to 45 minutes at a time, sit three hours per day, 45 minutes at a time, and occasionally balance. (Tr at 232-233.) On July 13, 1995, Dr. Kennedy concluded that plaintiff had reached maximum benefit from neuromuscular therapy. (Tr at 2.14.)

Administrative hearing

On September 11, 1995, the ALJ held a hearing on plaintiff's request for benefits. Plaintiff was represented by a nonattorney representative. Plaintiff testified that his activities included stretching, light housework, light yard work, reading watching television, listening to music and occasionally driving. (Tr at 38, 40.) Plaintiff stated that his pain was usually a 5 on a scale of 1. to 10, but on the day of the hearing it was a 2 or 3. (Tr at 39.) Plaintiff informed the ALJ that, despite his May 10, 1989, accident, he had continued to work through 1992, making telephone calls and driving to work sites. (Tr at 50.) Plaintiff stated that he could perform light lifting (Tr at 410), and stand and sit for short periods of time (Tr at 41, 42).

The ALJ posed a hypothetical question to the vocational expert ("VE") . The hypothetical assumed a person of plaintiff's age, education, and work experience, who could perform sedentary work with a sit/stand option that did not require Climbing, stooping, crawling or kneeling. (Tr at 53.) The VE testified that such a person could perform the sedentary, semi-

skilled jobs of a dispatcher and time keeper, and the unskilled jobs of telephone clerk and order clerk. (Tr,at 53-54.) The VE stated that these jobs exist in significant numbers in the national economy. (Tr at 53-54.) The VE admitted that plaintiff would not be able to perform these jobs if he had to lie down for two hours during the work day. (Tr-at 54.)

By decision dated October 27, 1995, the ALJ denied plaintiff's request for benefits. The ALJ found that plaintiff's impairment, while severe, did not meet or equal the severity of an impairment listed in Appendix I of the Regulations, and as such, the ALJ continued with the sequential evaluation and inquired as to plaintiff's ability to perform his past relevant work. The ALJ found that plaintiff's impairments and residual functional capacity precluded plaintiff-from performing his past relevant work. The ALJ proceeded to the fifth step. The ALJ found that plaintiff could perform other work, and that the government had met its burden to show that there exist occupations in the national economy in significant numbers that plaintiff can perform. With this finding, the ALJ concluded that plaintiff was not disabled.

In response to the ALJ's decision, plaintiff submitted to the Appeals Council a letter from Javier Leal, a counselor at the Texas Rehabilitation Commission. (Tr at 237.) It is Mr. Leal's opinion that plaintiff would not be able to tolerate daily driving from his home at Lake Mathis to Corpus Christi for training or work. Despite this evidence, the Appeals Council denied plaintiff's request for review on September 24, 1996 (Tr at 10-11), and the ALJ's decision became the final decision of the Commissioner.

DISCUSSION

1. Standard of Review

In reviewing the Commissioner's decision to deny disability and supplemental security benefits, the Court is limited to a determination that the decision was "supported by substantial evidence existing in the record as a whole and that no errors of law were made." *Harrell v. Bowen*, 862 F.2d 471, 475 (5th Cir. 1988) (citing *Neal v. Bowen*, 829 F. 2d 528, 530 (5th Cir. 1987) Substantial evidence is more than a scintilla, less than a preponderance, and is such that a reasonable mind might accept it as adequate to support a conclusion. Id. A finding of no substantial evidence is appropriate only if no credible evidentiary choices or medical findings exist to support the decision. *Johnson v. Bowen*, 864 F.2d 340, 343-44 (5th Cir. 1988).

2. Applicable law

In determining whether plaintiff was capable of performing substantial gainful activity, the ALJ utilized the five-step sequential procedure set forth in 20 C.F.R. § 404.1520(b)-(f).[4] A finding that a claimant is disabled or not

---

[4]The ALJ applies the following five-step sequential procedure in evaluating a claimant's ability to work:

(1) An individual who is working and engaging in substantial gainful activity will not be found disabled regardless of the medical findings.

(2) An individual who does not have a "severe impairment" will not be found disabled.

(3) An individual who meets or equals a listed impairment in Appendix 1 of the Regulations will be considered disabled without consideration of vocational factors.

(4) if an individual is capable of performing the work he has done in the past, a finding of "not disabled" must be made.

disabled at any point in the five-step process is conclusive and terminates the Commissioner's analysis. *Harrell v. Bowen,* 862 F.2d at 475.

Plaintiff bears the burden of proof on the first four steps. He must show that he is not working or engaged in substantial gainful activity and that he has a severe impairment. He must then show that he has an impairment that meets or equals a listing. If the claimant is unable to show that his impairment meets a listing, he must show that he cannot perform his past relevant work. *Leggett v. Chater,* 67 F.3d 558, 564 (5th Cir. 1995) At the fifth step of the evaluation, the burden shifts to the Commissioner to show that, considering the -claimant's exertional and nonexertional impairments, the claimant is able to do work that exists in the national economy. *Greenspan v. Shalala,* 38 F.3d 232, 236 (5th cir. 1994). If the Commissioner adequately points to potential alternative employment, the burden shifts back to the plaintiff to prove that he is unable to perform the alternative work. *Selders v. Sullivan,* 914 F.2d 614, 618 (5th Cir, 1990) (*quoting Fraga v. Bowen,* 810 F.2d 1296, 1302 (5th Cir. 1987)); *Anderson v. Sullivan,* 887 F.2d 630, 632 (5th Cir. 1989).

3. Plaintiff's objections

Plaintiff raises the following objections to the ALJ's findings:

(1) Incomplete record;

(2) Failure to consider new material;

---

(5) If an individual's impairment precludes him from performing his past work, other factors including age, education, past work experience, and residual functional capacity must be considered to determine if other work can be performed.

(3) Consideration of impermissible evidence;

(4) Failure to afford proper weight to the opinions of treating physicians;

(5) Error in concluding that failed work attempts constituted substantial gainful activity and were inconsistent with pain; and

(6) Failure to pose a complete hypothetical.

4. Analysis

(1) Incomplete record

Plaintiff first complains that the record is missing Exhibits 5 and 10 which are State Agency determinations as to plaintiff's disability. Plaintiff argues that, without these exhibits, it is not possible to recreate what determination had been made of plaintiff's residual functional capacity as of the dates of the reports, December 8, 1993, and February 4, 1994. Plaintiff contends that the absence of these documents "greatly prejudices" plaintiff because these documents would support the opinion of Mr. Leal of the Texas Rehabilitation Commission (Tr at 237) that plaintiff could not tolerate training or work on a daily basis.

The Commissioner correctly points out that Mr. Leal did not state that plaintiff could not tolerate work or training on a daily basis, but that he could not tolerate the daily drive from Lake Mathis to Corpus Christi for training or work. Moreover, even if the missing documents would support Mr. Leal's opinion, this finding would not assist plaintiff in his claim for benefits; lack of work in a claimant's local area is not a factor in determining disability under the Commissioner's regulations. 20 C.F.R. § 404.1586 (a) and (c) (2).

Plaintiff contends that it can be inferred that the missing documents would support his position. According to the List of

Exhibits to the administrative record in this case, (Tr at 1) Exhibit 5 is the December 8, 1993, Disability Determination by the State Agency on plaintiffs Title XVI claim and Exhibit 10 is the February 4, 1994, Reconsideration Disability determination by the State Agency on Plaintiff's Title XVI claim. The record does contain the Title II determinations from the State. (Tr at 6171, 78-79.) Plaintiff was denied Title II benefits. Plaintiff does not allege that the Title XVI determinations were based on different medical, educational, and vocational evidence as was used in the Title II determinations. Nor does plaintiff specify how he is prejudiced by the absence of these two exhibits.

2. Failure to consider new material

After the administrative hearing, plaintiff submitted the letter from the Texas Rehabilitation Commission counselor, Mr. Leal, to the Appeals Council. (Exhibit AC-1, Tr at 237.) The Appeals Council concluded that this additional evidence "does not provide a basis for changing the Administrative Law Judges decision." (Tr at 10.) Plaintiff argues that the decision of the Appeals Council not to reopen the case was erroneous because the ALJ should have had an opportunity to consider Mr. Leal's letter in consultation with the vocational expert, and to consider additional exhibits, AC-2 through AC-5. (Tr at 238-251.)

Plaintiff did not submit Exhibits AC-2 through AC-5 until October 17, 1996. (Tr at 8.) The Appeals Council had already denied his request for review on September 24, 1996. (Tr at 1011.) Even so, the Appeals council considered this second request to reopen along with the proffered exhibits. By letter dated November 6, 1996, the Appeals Council stated that it had reviewed the additional Exhib.its AC-2 to AC-5, but declined to reopen the case. (Tr at 5-6.)

The additional evidence submitted by plaintiff relates to his condition and treatment more than five months after the date, of the ALJ's'decision. For new evidence to be material, it must relate to the time period for which benefits were denied, and it must not concern evidence of a later-acquired disability or the subsequent deterioration of a previously non-disabling condition. *Haywood v. Sullivan*, 888 F. 2d 1463, 1471 (5th Cir. 1989) ; *Bradley v. Bowen*, 809 F.2d 1054, 1058 (5th Cir. 1987) (per curiam). Plaintiff's additional evidence, Exhibits AC72 through AC-5, was not material.

The Commissioner's decision not to reopen a case is not within the Court's subject-matter jurisdiction, absent a colorable constitutional claim. *Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. .980 (1977) ; *Robertson v. Bowen*, 803 F.2d 808, 810 (5th Cir. 1986) ; *Ellis v. Schweiker*, 662 F.2d 419, 420 (5th Cir. 1981) . In plaintiff's case, the Appeals Council considered plaintiff's new evidence, and found it not to be material. Plaintiff has not alleged any colorable constitutional claim. The Appeals Council's decision not to reopen the case is not subject to review by the Court.

3. Consideration of impermissible evidence

Plaintiff complains that the ALJ "engaged in impermissible sit and squirm justice" by considering the lack of discomfort shown by plaintiff at the administrative hearing. Plaintiff contends that this constitutes a from of "impermissible inference from personal observation that the claimant is not disabled. Plaintiff correctly points out that there is no correlation between the ability to sit through a hearing and the ability to work a full eight hour day, five days a week. *Lovelace v. Bowen*, 813 F.2d 55 (5th Cir. 1987).

It is not reversible error, however, for an ALJ to consider demeanor as one of several factors in evaluating a claimant's credibility. *Villa v. Sullivan*, 895 F.2d 1019, 1024

(5th Cir. 1.990) *(citing Burnside o/b/o Burnside v. Bowen*, 845 F.2d 587 (5th Cir. 1988)) . Moreover, the ALJ considered the objective medical evidence, the lack of medication for severe pain, and the frequency of medical treatment. (Tr at 18.) The ALJ also noted the plaintiff's credibility was diminished because he alleged disability during a period when he was working.[5]

4. Failure to afford proper weight to opinions of treating physicians

Plaintiff claims that the ALJ ignored the medical evidence in this case which showed a prolonged history of treatment for pain and only considered that evidence which "lead to a conclusion of not disabled." This is simply not the case. The ALJ in fact found that plaintiff has a severe impairment which prevents him from performing his past relevant work. (Tr at 20 -21.) The ALJ did conclude that plaintiff could perform sedentary work, but this conclusion is supported by the assessments of plaintiff's treating physicians.

Dr. Kennedy, plaintiff's treating orthopedic surgeon, reported that plaintiff's neurological examination was normal in March of 1993. (Tr at 141.) Dr. Kennedy opined that plainitff had reached maximum medical improvement on May 20, 1993, and he agreed with the Workhealth Services functional capacity assessment that plaintiff was capable of medium/heavy work (Tr at 137.) During testing at Workhealth, plaintiff demonstrated the ability to sit for 30 minutes at a time, stand for 15 minutes at a time, walk at 2.5 mph for 15 minutes

---

[5] Plaintiff claimed to be disabled commencing with the car accident on May 10, 1989. The ALJ found that plaintiff,s income for the years 1989, 1990, 1991, and 1992 indicated that plaintiff had been engaged in substantial gainful activity and was therefore, not disabled during those years. *See* 20 C.F.R. § 404.1574(b) (earnings which are presumed to be evidence of substantial gainful activity).

at a time, lift 110 pounds, and repetitively carry 50 pounds. (Tr at 174.) The functional capacity assessment adopted by Dr. Kennedy supports the ALJ's decision that plaintiff could perform sedentary work.

Dr. Avant, the neurologist who treated plaintiff during 1991 and 1992, reported that plaintiff's cervical spine showed only normal degenerative changes, and his lumbar spine was "quite remarkably free of any significant pathology." (Tr at 130.) Dr. Hurt, another neurosurgeon, reported that plaintiff's neurological examination was normal. (Tr at 187.) Dr. Sheffield, an orthopedic surgeon, opined that plaintiff would be able to return to his regular work if he lost weight and performed his exercises regularly. (Tr at 179.) No physician stated that plaintiff was disabled from performing all types of work activity. *See harper v. Sullivan*, 887 F. 2d 92, 97 (5th Cir. 1989) (relying in part on absence of physician statement of disability).

Plaintiff has presented new evidence from Dr. Joselevitz, a doctor specializing in rehabilitative medicine.[6] Dr. Joselevitz performed a physiatric evaluation on plaintiff on April 17, 1996. (Tr at 245-248.) Dr. Joselevitz diagnosed plaintiff with chronic low back pain, severe ligamentous injury to the right sacroiliac joint, and severe somatic joint dysfunction of the right sacroiliac. Upon reviewing Dr. Joselevitz's findings, Dr. Kennedy opined that plaintiff's disability is permanent and not surgically treatable. (Tr at 249.) Notably, however, even with this new evaluation, Dr. Kennedy opined that plaintiff's disability was "not total" based on the AMA Guide to permanent impairment. (Tr at 249.)

---

[6] As noted earlier, this new evidence was not before the ALJ or the Appeals Council in rendering their opinions. The Appeals Council did have this new evidence when it denied plaintiff's request to reopen his case.

5. Error in concluding that failed work attempts constituted substantial gainful activity.

Plaintiff argues the ALJ misinterpreted the law when he found that plaintiff had been engaged in substantial gainful activity during 1992 and was therefore not disabled, without regard to medical evidence. (Tr at 18.) Plaintiff contends that the earnings reflected in Exhibits 14 (Tr at 87-89) and 15 (Tr at 90) do not show that plaintiff was gainfully employed, but are "indicative of a failed work attempt," and that plaintiff's earnings during 1989-1992 fall below the presumptive earnings for substantial gainful activity. Plaintiff is incorrect.

The Social Security Act has authorized the Commissioner to determine the criteria under which services performed or earnings derived from work demonstrate the ability to engage in substantial gainful activity. 42 U.S.C. § 423(d)(4); *White v. Heckler*, 740 F. 2d 390, 392 (5th Cir. 1984). In exercising this authority, the Commissioner created a regulatory presumption that earnings above certain specified average monthly levels will ordinarily show that an individual has engaged in substantial gainful activity. For 1989, the monthly average was $300, and for 1990, 1991, and 1992, the monthly level was $500. 20 C.F.R. § 404.1574 (b)(2)(vi) and (vii). A self-employed individual whose earnings equal or exceed the monthly amounts listed in § 404.1574 (b) is presumed to engage in substantial gainful activity, and is therefore not disabled. The Commissioner is not required to look at additional medical evidence in such a case. *See Davis v. Schweiker* 641, F. 2d 283, 286 (5th Cir. 1981); *White v. Heckler*, 740 F. 2d 390, 394 (5th Cir. 1984).

Plaintiff's earnings record, which is based on his income tax returns, report that plaintiff earned $16,001.00 in 1989, $21,863.00 in 1990, $20,305.00 in 1991, and $13,001.00 in

1992. (Tr at 88, 90.) Plaintiff's earning for these three years exceeds the regulatory presumptive amount for substantial gainful activity.[7] The ALJ did not err in finding that plaintiff was not disabled for the years 1989, 1990, 1991 and 1992.

6. Failure to pose a complete hypothetical

Plaintiff's final complaint is that the ALJ failed to incorporate all of the exertional and nonexertional impairments within his hypothetical question to the vocational expert. Plaintiff argues that the ALJ must consider "the entire person" and not just the impairments he finds to be severe. Plaintiff, however, fails to identify what impairments or limitations were omitted from the hypothetical.

The ALJ's hypothetical question included a person of plaintiff's age, education and work experience who could perform sedentary work with a sit/stand option that did not require climbing, stooping, crawling or kneeling. (Tr at 53.) This hypothetical includes the abilities and limitations of plaintiff bases on the medical evidence presented.

The VE stated that plaintiff could perform sedentary jobs of dispatcher, time keeper, telephone clerk, and order clerk. (Tr at 53-54.) The VE agreed with plaintiff that these jobs would not be available to plaintiff if he had to lie down for two hours during each work day; however, nothing in the record suggests that plaintiff must lie down two hours out of every work day. The ALJ was not required to rely on this testimony in making his ruling because this limitation was not supported by the record. *Morris v. Bowen*, 864 F. 2d 333, 336

---

[7] The regulatory presumptive amount for substantial gainful activity in 1989 was $300 x 12 = $3,600; for 1990, 1991, and 1992, the amount was $500 x 12 = $6,000.

(5th Cir. 1988); *Owens v. Heckler*, 770 F. 2d 1276, 1282 (5th Cir. 1985).

RECOMMENDATION

The Administrative Law Judge's decision is supported by substantial evidence. This Court recommends that the District Court deny plaintiff's motion for summary judgment and affirm the decision of the Commissioner.

Respectfully submitted this 28 day of May, 1997.

/s/ Jane Cooper-Hill

JANE COOPER-HILL
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within TEN (10) DAYS after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to 28 U.S.C. § 636 (b)(1)(C), Fed. R. Civ. P. 72(b), and Article IV, General Order No. 80-5, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendations in a magistrate judge's report and recommendation within TEN (10) DYAS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Services Auto Assn'n*, 79 F. 3d 1415 (1996) (en banc).

APPENDIX 4

42 U.S.C. §405(g)

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United Stated for the judicial district in which the plaintiff resides, or has his principal place of business or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court of the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding to cause of a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant of such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The Court

may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security of further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in prior proceeding; and the Commissioner of Social Security shall, after the case in remanded, and after hearing such additional evidence if so ordered, modify of affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that is shall be subject to review in the same manner as a judgement in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.